STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Donofrio, P.J., and Zahra and Kelly, JJ.)

Joanne Rowland a/k/a Joan Rowland,	Supreme Court No. 130379
Plaintiff-Appellee,	Court of Appeals No. 253210
v	Trial Court No. 03-0128-NO (Washtenaw Circuit Court)
Washtenaw County Road Commission,	
Defendant-Appellant.	

AMICUS CURIAE BRIEF OF THE MICHIGAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

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INTEREST OF AMICUS CURIAE

The Michigan Trial Lawyers Association is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 2400 attorneys, the Michigan Trial Lawyers Association recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents important issues of law, the resolution of which are important to governmental tort liability jurisprudence in this state, and which will have a direct and substantial impact on anyone who suffers bodily injury or property damage due to a governmental entity's failure to keep a highway in reasonable repair or in a condition reasonably safe for travel.

ARGUMENT

I. Introduction.

This Honorable Court granted leave to appeal on March 31, 2006. In its order, this Court advised the parties to address (1) whether appellant's proposed overruling of *Hobbs v Michigan State Highway Department*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee County Road Commission*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), is justified under the standard for applying stare decisis as set forth in *Robinson v Detroit*, 462 Mich 429, 463-468; 613 NW2d 307 (2000), and (2) if this Court decides to overrule *Hobbs* and *Brown*, whether the Court's ruling should apply retroactively or prospectively under the standard set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 695-699; 641 NW2d 219 (2002).

Amicus Curiae Michigan Trial Lawyers Association agrees with plaintiff-appellee that the claim should not barred by the 120-notice provision unless the governmental entity was actually prejudiced by the late notice. Amicus Curiae Michigan Trial Lawyers Association will focus the first part of its argument on the constitutional question raised in *Hobbs* regarding whether a strict 120-day notice requirement is constitutionally viable.[1]

Amicus Curiae Michigan Trial Lawyers Association further asserts that, even assuming this Court overturns the long-established precedent of *Hobbs* and *Brown*, any

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[1] Although the constitutional issue was not specifically raised below, it is a necessary part of the Court's analysis under *Robinson* because it ties into whether *Hobbs* and *Brown* were correctly decided. Furthermore, even if the constitutional issue was not properly preserved for appeal, this Court has stated that a constitutional issue cannot be waived, and may even be raised for the first time on appeal to the Supreme Court. *Mich Chiropractic Counsel v Comm'r of Office of Fin'l & Ins Servs*, 475 Mich 363, 382; 716 NW2d 561 (2006).

new rule that is created by this Court's decision should only be applied prospectively.

Amicus Curiae Michigan Trial Lawyers Association submits this brief for the purpose of bringing this Honorable Court's attention to alternative grounds which mandate the same outcome as that proposed by Plaintiff-Appellee.

II The Doctrine of Stare Decisis Should Apply to this Court's Interpretation of the 120-Day Notice Provision under *Robinson v City of Detroit*.

This Court has asked whether Washtenaw County Road Commission's ("Road Commission") proposed overruling of *Hobbs v Michigan State Highway Department* and *Brown v Manistee County Road Commission* is justified under the doctrine of stare decisis, as discussed in *Robinson v Detroit*. The answer is no.

The highway exception represents one of the few areas in which the government has waived its immunity from liability if the governmental agency fails to keep the highway in "reasonable repair" or "in a condition reasonably safe for travel," and when that condition results in bodily injury or property damage to a person traversing the highway. MCL 691.1402. The Road Commission asks this Court to overturn 30 years of precedent by strictly construing the 120-day notice provision of the highway exception to governmental immunity. MCL 691.1404. The Road Commission requests this extraordinary relief even when the governmental entity has suffered no actual prejudice from receiving notice of the accident and defect beyond the 120 days provided in the statute.

The actual prejudice requirement is the most consistent with legislative intent and

most constitutionally sound way of interpreting the 120-day notice requirement.[2] This principle of actual prejudice protects both the persons injured by the defect in the road and the governmental entity responsible for that road. In applying *Robinson*, this Court should affirm *Hobbs* and *Brown.*

In *Robinson*, this Court outlined the following four-part test to determine whether a case should be subject to the doctrine of stare decisis: (1) was the earlier decision wrongly decided; (2) is there a "practical workability" of the earlier decision; (3) are the reliance interests so great that overturning the earlier decision would work an undue hardship; and (4) do changes in the law or fact no longer justify the questioned decision? In examining these four factors, this Court can only conclude that stare decisis results in a reaffirmance of *Hobbs* and *Brown*.

This Brief will focus on the first prong of *Robinson*: why *Hobbs* and *Brown* were correctly decided in light of the constitutional infirmities created by the 120-day notice rule

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[2] As a policy matter, the government is against shortening statutory limitations periods, such as with notice provisions or contract terms. For instance, the Michigan Commissioner of Financial and Insurance Services has issued two orders in response to the Michigan Supreme Court's decision in *Rory v Continental Insurance Company*, 473 Mich 457, 461; 703 NW2d 23 (2005) (holding that an insurance carrier could shorten limitations period for uninsured motorist benefits in its insurance contract from the three years period under Michigan statute to one year). Order No 06-008-M (April 4, 2006) (underinsured motorist coverage); Order No 05-060-M (Dec 16, 2005) (uninsured motorist coverage).The Orders can be accessed respectively at the following links:

http://www.mich.gov/documents/prohibitiion_order_and_memo_156299_7.pdf
http://www.mich.gov/documents/Prohibition_Order_121605_145496_7.pdf

The Commissioner determined that a limitation period of less than three years is unreasonable for uninsured and underinsured motorist coverage because the contract limitations period is "misleading" and "unreasonably or deceptively affect(s) the risk purported to be assumed in the general coverage of the policy" and because under this scheme the insured are paying for coverage that is "illusory as a practical matter." Order 06-008-M at 4; Order 05-060-M at 4.

if that rule were strictly construed with no actual prejudice component. Amicus Curiae Michigan Trial Lawyers Association adopts plaintiff-appellee's analysis of the *Robinson* factors.

A. Hobbs v Michigan State Highway Department *and* Brown v Manistee County Road Commission *Should be Upheld on the Basis that they Preserve the Constitutionality of a Notice Provision that would Otherwise Violate the Due Process*

This Court correctly decided *Hobbs* and *Brown*, which both affirmed that a plaintiff's notice after the statutory 120 days is sufficient as long as the governmental entity is not actually prejudiced by the late notice. *Hobbs, supra* at 96; *Brown, supra* at 367. Implicit in the *Hobbs* decision was the recognition that the 120-day notice requirement did not violate the constitution if it was only strictly construed when the government suffered actual prejudice.

1. History of *Hobbs* and *Brown* From A Constitutional Perspective

Hobbs came after the Supreme Court's opinions in *Reich v State Highway Department*, 386 Mich 617; 194 NW2d 700 (1972), and *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), which began to define the constitutional limits of the notice provision contained in the highway exception to governmental immunity. In *Reich*, the Court struck down a 60-day notice provision on the grounds that such short notice was unconstitutional. The *Reich* Court reasoned that the 60-day notice provision resulted in unequal treatment of persons injured by the governmental entity's negligent conduct as opposed to those injured by private tortfeasors. *Id* at 623. The Court held that the provision was "arbitrary and unreasonable." *Id* at 623. Although the *Reich* Court was only presented with a 60-day

notice provision, the Court's reasoning appeared to deem it unconstitutional to impose any notice provision on injured persons with suits against governmental entities because it was unequal treatment of those persons with suits against private tortfeasors. *Id* at 623.

The Supreme Court in *Carver* distanced itself from the *Reich* analysis when it decided that a six-month notice provision for a claim against the Motor Vehicle Accident Claim Fund did "not necessarily violate the constitution." *Carver, supra* at 100. The *Carver* Court explained that "even though some notice requirement may be permitted, a particular provision may still be constitutionally deficient." *Id* at 100. The Court provided some guidance on factors that should be considered in deciding whether a notice provision is constitutionally infirm. For instance, the Court considered whether the time specified in the notice was an extremely short period and the purpose that notice period served. *Id* at 100. The *Carver* Court declined to strike down the six-month notice provision in that case as unconstitutional because the Court could not "say with certainty what purpose the legislature had in mind in providing for this notice." *Id* at 100. However, the Court added that the plaintiff's claim could not be dismissed unless there was a showing of prejudice by failure to give timely notice. *Id.*

The *Carver* analysis was key in this Court's decision in *Hobbs.* In *Hobbs*, the Court extended the *Carver* actual prejudice holding to the 120-day notice provision under the highway exception to governmental immunity. *Hobbs, supra* at 96. Like the Court in *Carver*, the *Hobbs* Court declined to declare the notice provision unconstitutional as a matter of law on the "sole basis that failure to give notice within the prescribed time 'may result in prejudice.'" *Hobbs, supra* at 96. In examining the purpose of the 120-day notice provision, the Court could not find any purpose for that notice provision other than to

protect the governmental entity for actual prejudice. *Id* at 96. Accordingly, the Court upheld the 120-day notice provision on the condition that failure to comply with the provision would not result in dismissal of the suit unless the late notice actually prejudiced the governmental entity. *Id* at 96. Like the *Carver* court, the Court in *Hobbs* affirmed the constitutionality of the 120-day notice provision but recognized that the "actual prejudice" requirement was needed to make the statute constitutional. *Id* at 96. It determined that the notice requirement did not violate the constitution because it is not strictly construed unless the government can demonstrate "actual prejudice" from a delay in receiving notice.

Because the Court in *Reich* held a sixty-day notice provision to be constitutionally inadequate, it can be inferred that a 120-day notice provision that is always strictly construed without *Hobbs'* deference to whether the government was actually prejudiced by late notice, would be repugnant to the Constitution. *Hobbs*, supra at 96; *Reich*, supra at 623. The Supreme Court's interpretation of the notice provision in *Hobbs* only permits strict compliance with 120 days notice if the governmental entity suffered actual prejudice. *Hobbs* represents a victory for both governmental entities who are protected from late notice when it actually prejudices them, and for injured plaintiffs, who in all other instances do not provide notice within the 120-day period.

Twenty years after the Supreme Court decided *Hobbs,* this Court was asked to overrule *Hobbs* on the grounds that it was wrongly decided. In *Brown*, the Court noted that "[t]he only purpose that this Court has been able to posit for a notice requirement is to prevent prejudice to the governmental agency. . . Notice provisions, therefore, permit a governmental agency to gather evidence quickly in order to evaluate a claim." *Brown, supra* at 362 (citing *Hobbs, supra* at 96).

The governmental agency in *Brown* argued that the notice provision also served the purpose of allowing the county to remedy the road defect and prevent future injury. *Brown, supra* at 362. The Supreme Court in *Brown* rejected that argument, stating that "[a] future injury does not affect a governmental agency's ability to defend itself against the original claim." *Id* at 362. This Court should, likewise, reject the Road Commission's assertion that the purpose of the notice provision is to prevent future injuries by remedying the defect. (Appellant's Brief at 22)

First, if the purpose of the notice provision was to prevent future injuries, then the notice would be near simultaneous with the discovery of the defect and the injury. The injured plaintiff is not in the best position to notify the governmental entity that a condition in the road caused the accident. Nor should it be the obligation of the injured plaintiff to prevent future injuries. The persons in the best position to quickly notify the governmental entity and to increase the chance of preventing future injuries are the emergency responders who are called to an accident scene (the police officers, firemen, and EMS workers). Those emergency responders are the people who work in the community and are more likely in a position to know which governmental entity is responsible for that particular piece of highway. They are also in the best position to notify the government because of their emergency training–they not only respond to the emergency situation, but investigate the cause of the emergency, assist injured persons, interview witnesses, inspect the vehicles involved with the accident, examine the roadway on which the accident occurred, and observe the weather conditions. Emergency responders are equipped to handle multiple tasks on the scene, which they follow up with reports after they return to the office, station, or dispatch. It is not difficult to envision the emergency responders

making a quick telephone call or sending brief correspondence to the governmental entity responsible for the road to inform them that an accident has occurred.

Second, the purpose of the notice provision is not to prevent future injuries–although that may be an ancillary benefit of the notice–but to give the governmental entity an opportunity to defend itself in a lawsuit regarding the condition of the highway for which it might be responsible. *Hobbs, supra* at 96; *Brown*, *supra* at 362. The Road Commission, likewise, notes that the notice requirement ensures "prompt notice of a potential claim, thereby allowing the defendant to investigate and preserve evidence for its defense, as well as to lock the plaintiff in to a particular theory of liability." (Appellant's Brief at 5, 22) The governmental entity can gather evidence or take other steps to protect its interests in the impending legal dispute when it receives notice of a potential claim, regardless of whether the notice arrives after 120 days have passed. In the event that the governmental entity is hampered in its investigation due to the late notice, then the governmental entity can show that it was prejudiced by the late notice. As stated previously, the actual prejudice element protects the governmental entity when late notice prevents the government from properly investigating and preserving evidence for its defense.

After reviewing the purpose of the notice provision, the *Brown* court reaffirmed that the 120-day notice provision is reasonable, along with affirming *Hobbs'* decision that allows notice beyond the 120 days unless the governmental agency is actually prejudiced by the late notice. *Brown, supra* at 365. The notice provision only passes constitutional muster, however, because the actual prejudice component from *Hobbs* allows late notice as long as the governmental entity is not prejudiced by the late notice. *Hobbs*, supra at 96.

2. Constitutional Analysis of *Hobbs* under *Robinson* Protects Due

Process

This constitutional issue ties in with this Court's concerns about stare decisis in *Robinson*. The Court in *Robinson* explained that the courts should strictly construe the words of the legislation because "the courts have no legitimacy in overruling or nullifying the people's representatives." *Robinson, supra* at 322. However, the *Robinson* court noted an exception to that rule where there is a constitutional violation. *Id.* The only reason that the 120-day notice provision is not "necessarily unconstitutional" is because *Hobbs* created an exception to the notice provision unless the governmental entity was actually prejudiced. *Hobbs, supra* at 96; *Carver*, *supra* at 100.

Citizens have the constitutional right to due process. US Const amend 14; MCLA Const art 1 § 17. Both the United States and Michigan Supreme Courts have affirmed that "due process is flexible and calls for such procedural protections as the particular situation demands." *In re Brock,* 442 Mich 101, 111; 499 NW2d 752 (1993) (quoting *Mathews v Eldridge,* 424 US 319, 332, 334 (1976) (citation omitted)). When this Court analyzes the process due in a particular proceeding, its conclusions depend on the "nature of the proceeding and the interest affected by it." *Artibee v Cheboygan Circuit Judge,* 397 Mich 54, 57; 243 NW2d 248 (1976); *Klco v Dynamic Training Corp,* 192 Mich App 39, 42; 480 NW2d 596 (1991). In civil cases, generally, due process requires an opportunity to be heard in a meaningful time and manner. *Armstrong v Manzo*, 380 US 545, 552 (1965); *Klco, supra* at 42. This opportunity to be heard also includes the opportunity to attend and present claims or defenses. *Laird v Rinckey*, 371 Mich 96, 98; 123 NW2d 243 (1963). The opportunity to be heard does not require a full trial-like proceeding. *Klco, supra* at 42-43.

In this case, strict construction of the 120-day notice provision would not afford

persons injured by the negligence of the government a reasonable opportunity to be heard. Requiring notice only four months after an accident is not a "meaningful" restriction on the time or manner for a presentation of a claim. Many injured person may still be incapacitated from their injuries 120 days after the accident. But even those persons whose injuries have healed may not have the time or opportunity to locate an attorney to advise them of their rights. Even if the injured person has consulted with an attorney, the attorney should have a reasonable opportunity to investigate which governmental entity is responsible for that portion of the highway that caused the client's injuries. The 120-day notice provision is such an short period of time that injured persons should not be strictly bound by it when they have a legitimate claim against the government, file suit within the limitations period, and do not actually prejudice the governmental entity with the late notice. In this way, the actual prejudice component prevents the 120-day notice provision from offending the Constitution.

The *Hobbs'* actual prejudice decision also ties in with the legislative purpose of the Governmental Tort Liability Act. In passing the Act in 1964, the legislature created certain exceptions to the general rule that the government is not liable for injuries arising out of its governmental functions. *See, eg,* MCL 691.1402 (failure to keep highway in reasonable repair); MCL 691.1413 (dangerous and defective public buildings); MCL 691.1405 (negligent operation of motor vehicle). The highway exception for the government's failure to reasonably maintain the roadways was one of these exceptions. MCL 691.1402. Yet the fact of the matter is that the government enacted the statute to ensure that injured persons could sue the government for the governmental functions for which people in this state should be able to rely on the government, such as construction and maintenance of

highways.

3. Equity demands that the Court Preserve Hobbs and Brown

This Court should apply the doctrine of stare decisis to *Hobbs* and *Brown* as an equitable matter. From a constitutional perspective, the saving grace of the 120-day notice provision was this Court's opinion in *Hobbs,* which allowed late notice unless there was actual prejudice to the governmental entity. Equity weighs heavily in favor of stare decisis for several reasons.

First, the120-day notice requirement would in many cases cause undue hardship for the injured plaintiff who may still be hospitalized or otherwise disabled as a result of the accident a mere 4 months after the accident. Even if the injured person knows that statutes of limitations restrict how long a person can wait to bring an action, in all likelihood, the injured person does not know that they have to seek the advice of an attorney in less than 120 days after the accident so the attorney can provide notice by the 120-day mark. In addition, the injured person may not know which governmental agency is responsible for the piece of the road where the accident occurred.

Second, *Hobbs* protects people from an arbitrary notice deadline unless the government would actually be prejudiced by receiving late notice. It is unjust to dismiss a case that has stated a proper claim under the statute against governmental entity and that was filed within the statute of limitations so it is not a stale claim, and dismiss only because the government did not have "notice" of the claim within 120 days. Such a short period should be suspect, and as the Court stated in *Hobbs* and *Brown,* the only real purpose of the notice provision is to give governments fair warning so it can defend a claim against it by investigating the accident site, thus preventing "actual prejudice" from the late notice.

If the accident site has not changed and the government is able to investigate the scene for its defense, then the government is not prejudiced by receiving notice after the 120 day period.

B. Overturning Hobbs *and* Brown *Would Violate the Right to Equal Protection of Injured Plaintiffs Who have Claims Against a Governmental Agency.*

In *Reich v State Highway Department*, this Court held that a 60-day notice provision for a claim against the government violated the equal protection clause. While Amicus Curiae Michigan Trial Lawyers Association recognizes that the holding of *Reich* has been limited by *Carver*, *Hobbs,* and other cases, this Court has never overruled *Reich.*

Appellant cited authority from various Supreme Courts from other jurisdictions that have addressed the constitutionality of notice provisions in cases against governmental entities. (Appellant's Brief at 21) However, not all of these case address whether or not notice provisions such as the one at issue in *Rowland* are constitutionally invalid under the equal protection clause. Instead, most of the cases cited by Appellants deal with the sufficiency of the notice provided by the injured plaintiff, whereas *Rowland* involves adequate notice that is merely provided after 120 days (but before the filing of the limitations period) and where the governmental entity is not prejudiced by the late notice.

For example, in *Warkentin v Burns*, 610 A2d 1287, 1289-1290 (Conn. 1992), the Connecticut Supreme Court concluded that notice given by the plaintiff was insufficient because it did not state that plaintiff intended to file a claim, rather the plaintiff just gave details of the accident. This is different from the court holding that a notice provision in a statute is always constitutionally valid. Similarly, in *King v Boston*, 15 NE2d 191, 193-194 (Mass 1938), the real issue of the case was whether the plaintiff gave sufficient notice. The

case held that the form of notice given is not sufficient to fulfill the purpose of the statute, then the claim will be barred. In *King,* the plaintiff gave notice within the time period prescribed by the statute. Unlike *Rowland*, the plaintiff in *King* provided timely, but inadequate notice, thus timing was not at issue. Further, contrary to Appellant's citation, *Besette v Enderlin School District*, 288 NW2d 67, 74 (ND 1980), held that a notice provision was valid to bar a parent's claim for injuries to his child, but that the child's claim was not barred where the legislature provided for an extended notice period for minors. *Id*. *Bessette* is not a persuasive comparison to the *Rowland* case as this Court is not asked to determine the effect of the notice provision in MCL 691.1404 as it applies to minors.

Sufficiency of notice was also the issue before the Court in *Shields v State Highway Commission*, 286 P2d 173, 177 (Kan 1955), where the plaintiff mailed notice of his claim on the ninetieth day after the accident but it was not received until days later. The court held that such notice was insufficient because the statute provided a 90-day limitation period.

Also, while *Barroso v Pepin*, 261 A2d 277, 279-280 (RI 1970), upheld a notice provision, it was not based on a constitutional analysis. The *Barroso* Court held that the statute at issue did not provide a separate remedy for suits against a municipality, but restricted the availability of a cause of action listed in another statute. This is completely different from *Rowland*, where the issue for the Court is whether the notice provision provided in MCL 691.1404 is constitutional under the equal protection clause, although it creates a suspect class by treating private tortfeasors and government tortfeasors differently.

Many of the cases cited by Appellants have only addressed the constitutional issue

presented by notice provisions in governmental immunity statutes in dicta where the real issue of the cases was sufficiency of the form of notice. Additionally, these cases allow the notice provisions because they protect the government from prejudice. However, the 120-day notice requirement at issue in *Rowland*, as interpreted by *Hobbs* and *Brown,* achieves this goal by permitting late notice only if the government is not prejudiced. Surely if the legislature observed a problem with that interpretation, then it would have expressly prescribed that the notice provision be strictly construed. However, in the 30 years since the *Hobbs* Court interpreted the statute, the legislature has sat silent. Numerous other state Supreme Courts have held that a notice provision similar to the one at issue in this case does violate the equal protection clause. *See, eg, Hunter v N Mason High Sch*, 539 P2d 845, 849 (Wash 1975) (120-day notice)*; Turner v Staggs*, 510 P2d 879, 882; (Nev 1973), *cert denied*, 414 US 1079 (six-month notice provision); *Lepon v Tiano*, 381 SE2d 384 (W Va 1989) (six-month notice)*; Crandall v City of Birmingham*, 442 So 2d 77, 79 (Ala 1983) (90-day notice); *Miller v Boone County Hosp*, 394 NW2d 776, 780-781 (Ill 1986) (60-day notice provision); *Gleason v Davenport*, 275 NW2d 431, 436 (Iowa 1979) (30-day notice provision). It does not appear that the United States Supreme Court case has addressed the issue of whether a notice provision for a suit against a governmental entity violates the equal protection clause of the United States Constitution.

From the cases described above, it is apparent that the case at hand presents genuine constitutional issues of due process and equal protection. This Court should affirm *Hobbs* and *Brown* to preserve the constitutionality of the 120-day notice provision of MCL 691.1404.

III If this Court Decides to Reject 30 Years of Precedent, Then it Should Only Apply Its Decision Prospectively.

In Michigan, the general rule is that judicial decisions are given full retroactive effect. *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). However, the Court should not give retroactive effect to a decision when it might result in an injustice. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). The Court in *Pohutski v City of Allen Park*, examined the appropriateness of prospective-only application of the rule the Court announced in that case. The Court in *Pohutski* outlined a four-part test in deciding that prospective-only application was proper under the circumstances of that case: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; (3) the effect of retroactivity on the administration of justice; and (4) whether the decision clearly established a new principle of law. *Pohutski, supra* at 696 (citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971), and *Riley v Northland Geriatric Ctr (After Remand),* 431 Mich 632, 645-646; 433 NW2d 787 (1988)).

In *Pohutski*, the Court analyzed whether a prior decision correctly interpreted the governmental tort liability act when it allowed claims of trespass and nuisance to be filed against the governmental entity. *Pohutski, supra* at 685 (citing *Hadfield v Oakland County Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988)). The *Pohutski* Court determined that the Court had wrongly decided *Hadfield* and ruled that the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. *Pohutski, supra* at 689-690.

The *Rowland* case similarly analyzes an issue related to the waiver of governmental immunity. This Court has asked the parties to evaluate whether *Hobbs* and *Brown* should

be overruled under the *Robinson* factors. While Amicus Curiae Michigan Trial Lawyers Association strongly assert that *Hobbs* and *Brown* remain good law, should this Court decide to overrule *Hobbs* and *Brown*, then the *Rowland* case is the same as *Pohutski* and should result in a prospective-only application of the rule. An examination of the *Pohutski* Court's analysis of the prospective-only factors demonstrates the affinity between *Pohutski* and *Rowland*.

A. Overruling *Rowland* Will Create a New Principle of Law and Requires the Court to Balance the *Pohutski* Factors

The *Pohutski* court analyzed the threshold question of whether its decision clearly established a new principle of law. *Pohutski, supra* at 696. The Court noted that although its decision "gives effect to the intent of the Legislature that may be reasonably inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in *Hadfield* and *Li* [*v Feldt*, 434 Mich 584; 456 NW2d 205 (1988)]." *Pohutski, supra* at 696. If this Court decides to overturn *Hobbs* and *Brown,* then it is likely to do so on the grounds that *Hobbs* and *Brown* failed to give effect to the intent of the Legislature when it enacted the 120-day notice requirement. Accordingly, this Court's decision is "akin to the announcement of a new rule of law" in light of what this Court has deemed to be erroneous interpretations set forth in *Hobbs* and *Brown. See Pohutski, supra* at 696.

The Court of Appeals further clarified the threshold question of whether a case introduced a new principle of law and emphasized that overruling previous opinions was not dispositive as to whether the decision should have prospective-only application. *Adams*

v Dep't of Transp, 253 Mich App 431, 436; 655 NW2d 625 (2002). Instead, the case law overruled must have been "clear and uncontradicted," considering the entire body of case law. *Id* at 437. In this case, the case law was "clear and uncontradicted," evidenced by the length of time between the original decision in *Hobbs* and the reaffirmance of the *Hobbs*' holding in *Brown* over twenty years later. *Pohutski, supra* at 96.

1. Retroactive Application Will Not Serve the Purpose of the Court's Decision

Moving to the remaining factors to be weighed by this Court, this Court must first consider the purpose of the new decision. *Pohutski, supra* at 696. In *Pohutski*, that factor weighed in favor of prospective-only application because the purpose of the new decision was to clarify a mistake in previous interpretations of the tort liability act. *Id* at 697. Similarly, the only purpose for overruling *Hobbs* and *Brown* would be to correct the Courts' previous interpretation of the notice requirement provided for in MCL 691.1404. Thus, a decision overruling those cases would remedy a mistake and create a new, more stringent time limit for providing notice. Simply put, when *Hobbs* and *Brown* are in effect, providing notice later than 120 days after an accident does not necessarily bar a claim against the government. If *Hobbs* and *Brown* are overruled, one who cannot give notice within 120 days loses his right to file a claim. The results are dramatically different. Nonetheless, retroactive application would not further the purpose of clarifying the notice requirement.

2. The Extensive Reliance on *Hobbs* Warrants Prospective-Only Application

Second, the court must consider the extent of reliance on the previous case law. *Pohutski, supra* at 696. In *Pohutski*, reliance weighed in favor of prospective-only

application because, under the prior case law, residents were discouraged from obtaining their own insurance, whereas municipalities were encouraged to purchase insurance. *Pohutski*, *supra* at 697. Consequentially, both groups relied heavily on *Pohutski's* predecessor. By only applying the new decision in *Pohutski* prospectively, the Court acknowledged that reliance. *Id.*

As in *Pohutski*, the parties in *Rowland* and like cases have relied on 30 years of precedent in *Hobbs.* Many injured persons have sought the help of attorneys who relied on the binding interpretation of MCL 691.1404's notice requirement in *Hobbs* and *Brown.* Undoubtedly, many other attorneys have written opinion letters to their clients referencing the law as represented by *Hobbs* and *Brown*, and accepted cases that will be barred by the 120-day notice provision after this Court announces its new decision in *Rowland.* Furthermore, it is likely that many cases with late notice were pursued on the ground that the trial courts would allow the case to proceed as long as there was no prejudice to the governmental agency. The parties and attorneys relied on the trial and appellate court's rulings that refused to dismiss a case solely due to late notice.

This Court can also look to *Gladych v New Family Homes, Inc*, 468 Mich 594, 607; 664 NW2d 705 (2003), for additional support for the prospective-only application of the 120-day notice rule in *Rowland.* In *Gladych,* the Court was asked to decide whether the statue of limitations was tolled by simply filing a complaint as previously held by the Court in *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971), or whether conditions listed in MCL 600.5856 also had to be complied with to toll the statute. *Id* at 595.

After analyzing and comparing the *Pohutski* decision, the Court in *Gladych* held that the *Buscaino* Court ignored the plain language of both MCL 600.5856 and 600.5805, and

it overruled *Buscaino* reasoning that taken together the statutes were unambiguous and required more than the mere filing of a complaint to toll the statute. In its analysis the *Gladych* Court noted that there was heavy reliance on *Buscaino*. Specifically, citizens and attorneys relied on that decision to calculate deadlines with respect to limitations periods and deadlines. *Gladych*, *supra* at 606. Because the legal community had relied on the rule of *Buscaino* for so long, this Court ordered that its decision be given only prospective application, except for a small number of pending cases in which the issue had been specifically preserved. If, therefore, this Court decides to overrule *Hobbs* and *Brown*–which parties and their attorneys have relied on for decades–it should limit the effect of its opinion to cases arising after the date of the decision.

3. Prospective-Only Application is Appropriate to Address the Impact on the Administration of Justice

The third consideration for the Court to weigh is the effect of the decision on the administration of justice. *Pohutski, supra* at 696. This was also a key factor in *Pohutski*, where plaintiffs with cases already pending when *Pohutski* was decided had neither the relief of *Hadfield* or the new statute regarding governmental liability in sewage disposal system event cases. They were caught in legal limbo. To avoid this tenable situation, this Court provided for prospective-only application of its holding. *Pohutski*, 465 Mich at 698. Thus, those parties with pending cases were permitted to have their day in court.

Prospective-only application of *Rowland* will permit the administration of justice for those injured persons who have already exceeded the 120-day notice requirement, but have either filed their claims within the statute of limitations or still have the opportunity to file them. Retroactive application would leave many injured persons with no remedy after

they and their attorneys properly relied on the actual prejudice component to the 120-day notice as set forth in *Hobbs* and affirmed by *Brown*.

B. *Rowland* is Distinguishable from Cases that Declined to Adopt Prospective-Only Application

The *Rowland* case not only meets the elements of the *Pohutski* test, but it is distinguishable from post-*Pohutski* cases that have rejected prospective-only application. For example, in *Paul v Wayne County Department of Public Service*, slip op at 4 (Mich App, July 20, 2006, Case No. 266956), a plaintiff was injured on the shoulder of the highway and brought suit against the Wayne County Department of Public Service under the highway exception to MCL 691.1402. However, during the course of the litigation, this Court decided in *Grimes v Michigan Department of Transportation*, 475 Mich 72; 715 NW2d 275 (2006), to overrule *Gregg v State Highway Department,* 435 Mich 307; 458 NW2d 619 (1990). The *Grimes* Court held that a "shoulder" was not part of the highway and, therefore, did not fit within the highway exception in the government immunity statute. *Grimes, supra* at 74. The issue in *Paul* was whether the new holding in *Grimes* applied retroactively to *Paul* since the *Paul* case was already pending in reliance of the *Gregg* precedent. *Paul, supra* at 2-3. The *Paul* Court answered in the affirmative and applied the *Grimes* holding to *Paul*, denying plaintiff relief under the old precedent. *Paul, supra* at 4.

Although *Grimes* introduced new law, the Court denied prospective-only application in *Paul* because the Court of Appeals did not believe that it weighed convincingly in favor of prospective application given the three *Pohutski* factors. *Id* Specifically, the Court reasoned that since *Grimes* correctly interpreted the statute that was already in place when

Plaintiff had his accident and the statute excluded "shoulders" from the highway exception to government immunity statute, the plaintiff never really had a cause of action. *Id.* Therefore, the Court decided that it was not unfair to apply *Grimes* retroactively to *Paul*. *Id*.

However, in the *Rowland* case it cannot be said that retroactive application would be fair or just. Here, unlike *Paul*, a cause of action did exist because the plaintiff's injury falls within the exception to governmental immunity. The cases that would be dismissed under the rule announced in *Rowland* are ones that were filed before the expiration of the statute of limitations and for which the government has already waived immunity when the unreasonable condition of the road caused the injuries. The cases that would be dismissed under this Court's retroactive application would only be dismissed because they failed to provide notice to the governmental entity within 120 days of the injury, regardless of whether the government was actually prejudiced by the late notice.

The *Rowland* case is also different from *Adams*. In *Adams*, plaintiff's husband was permanently injured when his car collided with a delivery truck at an intersection. *Id* at 433. Plaintiff filed suit against the Michigan Department of Transportation alleging that defendant had failed to put up temporary stop signs or take proper safety precautions when traffic lights were knocked out by a winter storm. *Id.*

During the lawsuit, the Michigan Supreme Court in *Nawrocki v Macomb County Road Commission*, 463 Mich 143; 615 NW2d 702 (2000), held that the highway exception to the governmental immunity statute did not allow claims premised on areas of special danger or the installation, maintenance, or improvement of traffic control devices. *Id* at 176-180. Given the holding in *Nawrocki*, the *Adams* court was faced with the question of

whether the holding in *Nawrocki* should be applied retroactively barring plaintiff's claim, or whether a prospective-only application was appropriate. *Adams, supra* at 434.

In its determination that *Nawrocki* should be applied retroactively, the Court of Appeals focused on the threshold question of whether *Nawrocki* overruled "clear and uncontradicted" case law. *Id* at 437. In its analysis, the court cited the inconsistent judicial interpretations of the governmental immunity act as to whether the highway exception to governmental immunity allows claims based on areas of special danger or the installation, maintenance, or improvement of traffic control devices. *Id* at 434, 437-438. Further, the Supreme Court in *Nawrocki* did not overrule clear and uncontradicted case law, it merely provided the correct interpretation of the highway exception to the governmental immunity statute that had been misinterpreted in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603. Because *Nawrocki* did not overrule clear and uncontradicted case law, the *Adams* court did not continue with the *Pohutski* analysis and instead applied retroactive application to *Nawrocki* based on the first *Pohutski* factor. *Adams, supra* at 438.

Unlike *Nawrocki*, and like *Pohutski,* the *Rowland* case meets the threshold question in that it would overrule the settled precedent of *Hobbs* and *Brown* and establish a new principle of law, requiring balancing of the three additional *Pohutski* factors. This precedent has been long-standing and rarely contradicted. In contrast, in cases like *Nawrocki* where the main issue is whether the highway exception to the government immunity statute applies to certain situations, there has been a turbulent history fraught with confusion and judicial misinterpretation. *Mason v Wayne County Bd of Comm'rs*, 447 Mich 130, 138; 523 NW2d 791 (1994) (declining to apply the highway exception where government failed to post adequate signs); *Scheurman v Dep't of Transp*, 434 Mich 619, 632; 456 NW2d 66

(1990) (excluding street lighting from highway exception); *Suttles v Dep't of Transp*, 457 Mich 635, 642-643, 578 NW2d 295 (1998) (commenting in dicta on the unsettled nature of governmental immunity statute).

However, the meat of the issue in *Rowland* is not whether the highway exception applies to the case. Rather, the issue is whether failure to comply with the 120-day notice provision in the statute bars a claim against the government given *Hobbs'* 30-year precedent establishing an actual prejudice requirement before a claim is barred for failure to provide notice within 120 days. That rule has been clear and rarely contradicted for such a long period of time that overruling it is akin to establishing a new principle of law. As a result, the *Rowland* case should be treated in accordance with the *Pohutski* analysis and given a prospective-only application.

Another post-*Pohutski* case that is different from *Rowland* is *Johnson v White*, 261 Mich App 332, 336; 682 NW2d 505 (2004). In *Johnson*, the issue was whether to apply the holding in *DeRose v DeRose*, 249 Mich App 388; 643 NW2d 259 (2002) (declaring grandparent visitation statute unconstitutional and terminating grandparent visitation rights), prospectively or retroactively. After concluding that the *DeRose* decision resulted in a new principle of law, the court then considered the *Pohutski* factors. *Id* at 338. In its holding that the *DeRose* decision be given full retroactive application despite reliance on the statute, the court reasoned that applying the decision in a prospective-only manner would not accord deference to a custodial parent's decisions regarding his or her child. *Id* at 344. Further, the court concluded that, unlike *Pohutski*, full retroactive application of *DeRose* had little danger of creating a mass of new litigation. *Id.* Additionally, since the *DeRose* case nullified the grandparent visitation statute and reemphasized the constitutional rights of

custodial parents to make decisions regarding the care and welfare of their children, prospective-only application was inappropriate. *Id* at 344-345.

Rowland is different from *DeRose* because, in the present case, overruling established precedent would prevent those with pending or potential litigation from having their day in court. Moreover, in *DeRose*, reliance was limited to grandparents, whereas in *Rowland*, courts, accident victims, insurance companies, and attorneys have relied heavily on *Hobbs* and *Brown*. Prospective-only application serves to recognize the impact on such persons and diminishes the possibility of unjust and inequitable retroactive application.

Fairness and equity dictate that if *Hobbs* and *Brown* are overturned, the decision should only be applied prospectively. If not, injured persons like the plaintiff in *Rowland*, who have already defeated summary disposition against defendants claiming improper notice, will have their right to be made whole abolished even though their cases are pending.

CONCLUSION

Without the actual prejudice component of *Hobbs*, the 120-day notice provision would violate the due process and equal protection clauses of the Constitution. If there were no actual prejudice component, injured persons would be denied any meaningful opportunity to present their claims against the governmental entity that caused their injuries by their negligent conduct. In this way, the actual prejudice component affords the injured person a meaningful time and manner in which to be heard, as required by the Constitutions of the United States and of Michigan. The actual prejudice component also prevents the 120-day notice provision from violating the equal protection clause because otherwise the notice requirement treats accident victims differently based on the type of

tortfeasor.

If this Court rejects the doctrine of stare decisis, reverses *Hobbs* and *Brown*, and announces a new rule of law, then this Court should only apply the decision prospectively only. As in the *Pohutski* case, the factors arising in *Rowland* demonstrate that parties and their attorneys have relied on the long-standing precedent of *Hobbs* and *Brown*; that prospective-only application would further the administration of justice; and the purpose of the new decision is to allegedly correct the previous incorrect interpretations of the Michigan Supreme Court.

RELIEF REQUESTED

Amicus Curiae Michigan Trial Lawyers Association of American respectfully requests that this Honorable Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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Proof of Service

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

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I declare that the statements above are true to the best of my information, knowledge, and belief.

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